

SERVED: April 10, 1992

NTSB Order No. EA-3529

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D. C.
on the 19th day of March, 1992

BARRY LAMBERT HARRIS,
Acting Administrator,
Federal Aviation
Administration,

Complainant,

Docket

SE-9801

v.

DAYLE MILLER ANDERSON,

Respondent.

OPINION AND ORDER

Respondent has appealed from the oral initial decision of Administrative Law Judge William R. Mullins, rendered at the conclusion of an evidentiary hearing on August 28, 1989.¹ The law judge affirmed an order of the Administrator charging respondent with a violation of section 91.75(b) of the Federal Aviation Regulations ("FAR," 14 C.F.R. Part 91) for deviating from the clearance assigned by

¹An excerpt from the hearing transcript containing the initial decision is attached.

Air Traffic Control (ATC).² The law judge, however, reduced respondent's sanction from a suspension period of 30 to 15 days.³

After consideration of the briefs of the parties and the record below, the Board concludes that safety in air commerce or air transportation and the public interest require that the Administrator's order finding that respondent violated FAR section 91.75(b), as modified by the initial decision, be affirmed.

The incident at issue is factually quite simple. On May 27, 1988, respondent was second-in-command (SIC) of Conquest Airlines Flight 601 from Tyler, Texas to Austin, Texas. Respondent was a new employee at the time of the incident, with only one day's experience as a first officer for Conquest Airlines. In addition, a principal operations inspector from the FAA was aboard the aircraft, conducting an enroute inspection. The aircraft was cleared to 4,000 feet but climbed to 5,000 feet.

The pilot-in-command (PIC) testified that before takeoff, he received a clearance from ATC to climb and maintain 6,000 feet. Shortly thereafter, the clearance was

²"§ 91.75 Compliance with ATC clearances and instructions.

(b) Except in an emergency, no person may operate an aircraft contrary to an ATC instruction in an area in which air traffic control is exercised."

³The Administrator did not appeal the reduction in suspension period.

amended to 4,000 feet, which the captain apparently set on the altitude alert.⁴ The captain further testified that he told respondent to "be cool . . . let me do the work," because he thought that respondent might be a bit nervous given the circumstances of the flight.⁵ The aircraft climbed through 4,600 feet before the captain noticed that the altitude alert read 4,000. After confirming with ATC that the clearance was indeed 4,000 feet, he immediately brought the aircraft down to the correct altitude.⁶

Respondent testified that he did not hear the clearance because he was busy completing other tasks. He conceded, however, that the altitude alert was in his plain view. Though he does not dispute that the aircraft flew through the assigned altitude, respondent maintains that, since the captain told him to "be cool," it was not his responsibility

⁴The captain testified that he did not remember receiving the amended clearance. It was established later through the tape of his communication with ATC that he had received and acknowledged the amended clearance.

⁵The captain could not remember his exact words to the respondent, but knew he made statements with the effect of "just be cool," and "don't do anything out of the ordinary or, you know, try to be extra cautious or extra safe." Transcript at 86.

He further testified that even though he told respondent to "be cool," he expected respondent, as first officer, to call out altitudes. He stated that the co-pilot "has a responsibility to help the pilot" and to alert him if the aircraft climbs through the assigned altitude.

⁶The Administrator issued an order suspending the captain's airman certificate for 30 days, alleging that he also violated FAR section 91.75(b). The captain appealed, but before the hearing, agreed to withdraw his appeal for a reduction in sanction to a 15-day suspension.

to monitor the altitude.⁷ He claims instead that he was merely following the orders of the PIC. Respondent asserts that the captain, as PIC, had the ultimate responsibility for every aspect of the flight, had the right to assume all duties, and thereby absolved respondent of any culpability for the altitude deviation.

We do not agree that respondent's failure to help insure that the aircraft complied with its clearance is somehow justified because the PIC made a comment that, in our judgment, cannot reasonably be understood to have been intended to relieve respondent of his responsibility.⁸ The ambiguous statement of "be cool" is an inadequate basis on which to rest the abdication of the responsibilities of the SIC.

Clearly, a PIC is responsible for the operation of the aircraft he commands. This does not mean, however, that the SIC bears no responsibility for the safety of the flight. In Administrator v. Daniels, 2 NTSB 2346 (1976), we stated that "the first officer shares in the responsibility for the safety of the flight" Id. at 2348. We explained that though the captain has the greater accountability, both he

⁷Respondent repeatedly testified that he did not know what the altitude clearance was and did not see a need to inquire about it because the captain told him that he would "take care of things."

⁸A more plausible explanation is that the PIC was trying to put respondent at ease given the circumstances of the flight.

and the first officer are responsible for the safe operation of the flight. See also Administrator v. Pierson and Lundy, 2 NTSB 403 (1977).

Under FAR section 135.99, Flight 601 required a second-in-command.⁹ According to the Conquest Airlines Flight Manual, the SIC must call out an altitude deviation of plus or minus 200 feet when it occurs without an explanation from the captain. Id., section 701, Standard Operating Procedures at 27. The SIC is also required to call out the altitude when the aircraft is 1,000 feet from the assigned altitude. Id. at 26. As SIC, respondent also had a general duty to alert the captain to any potentially dangerous situation he observed during the flight.¹⁰

⁹FAR section 135.99 states:

"§ 135.99 Composition of flight crew.

(a) No certificate holder may operate an aircraft with less than the minimum flight crew specified in the aircraft operating limitations or the Aircraft Flight Manual for that aircraft and required by this part for the kind of operation being conducted.

(b) No certificate holder may operate an aircraft without a second in command if that aircraft has a passenger seating configuration, excluding any pilot seat, of ten seats or more."

The Beech Model 1900C, the aircraft operated in the instant case, had a passenger configuration of more than 10 seats.

¹⁰The Conquest Airlines Flight Manual states:

"If a flight deviation or critical situation is observed by the SIC and there is no response by the PIC to his challenge, a second challenge must be made. If there is still no response, the SIC
(continued. . .)

Respondent insists that only one person can be found to have deviated from the altitude clearance since "only one person can fly an aircraft at a given time." This argument is inherently faulty, as it is inconsistent with Board precedent and the FARs.¹¹ See, e.g., Administrator v. Hart, 2 NTSB 1110 (1974).¹² Respondent further argues that "if

¹⁰(...continued)

announces he is assuming control and takes the necessary control of the airplane to keep it in, or return it to, a safe operating envelope. Response, as used herein, means verbal as well as appropriate action."

Id., section 701, Standard Operating Procedures at 2.

¹¹Respondent also argues that- the law judge based his finding on what he perceived as carelessness or negligence in not calling out the aircraft's altitude. Respondent asserts that his failure to call out altitudes did not cause the aircraft to deviate from its assigned altitude and therefore the law judge based his decision on an act or omission that was not specifically proscribed by section 91.75(b). We find this argument unpersuasive. Simply because the law judge perceived respondent's conduct to be careless does not alter the law judge's conclusion that respondent, as SIC, had the responsibility, as alleged, to operate the aircraft in accordance with ATC instruction and that he neglected this responsibility.

¹²In Administrator v. Hart, 2 NTSB 1110 (1974), a first officer attempted to argue that he could not be held responsible for the aircraft's deviation from its assigned airway. He claimed that he did not "operate" the plane because the captain was in actual physical control of the aircraft. We did not accept this narrow interpretation:

"In our judgment, . . . the term 'operate' should logically be given broader construction to include those required flight crewmembers whose participation in the operation of an aircraft is essential to the safety of flight. It follows that a copilot's failure to perform the duties assigned to his position could constitute a violation of a regulatory provision . . . which proscribes a person from operating an aircraft in a certain manner."

(continued. . .)

his pilot-in-command tells him to keep quiet and don't do anything but his company manual tells him that he has certain duties to perform," he should "keep quiet and let the pilot fly the airplane." Apart from the fact that the record does not support a finding that respondent was so directed by the PIC, we disagree with his legal assessment. When the first officer, as here, is required to be present, the regulations dictate that he shares responsibility for the safe operation of the flight whether or not he personally performs all of his crewmember duties.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied; and
2. The Administrator's order, as modified by the initial decision, is affirmed.¹³

COUGHLIN, Acting Chairman, LAUBER, KOLSTAD, HART, and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

¹²(. ..continued)
Id., at 1111-12.

In Hart, we found that the first officer was not accountable because his duty to monitor the flight's navigational position and advise the captain of any deviation from the assigned airway was not outlined with sufficient specificity in the regulations or flight manual. In the instant case, however, a first officer's duty to call out the aircraft's altitude at 1,000 feet before reaching the assigned altitude was distinctly stated in the Conquest Airlines Flight Manual.

¹³For the purpose of this order, respondent must physically surrender his certificate to a representative of the Federal Aviation Administration pursuant to FAR § 61.19(f).